DOCUMENT RESUME

ED 172 384 **EA 011 807**

AUTHOR	Connors, Eugene T.
TITLE	Student Discipline and the Law. Fastback 121.
INSTITUTION	Phi Delta Kappa Educational Foundation, Bloomington, Ind.
PUB DATE	79
NOTE	63p.; Not available in paper copy due to small print size of original document
AVAILABLE FROM	Phi Delta Kappa, Eighth and Union, Box 789, Bloomington, Indiana 47402 ($0.75; quantity discounts; a $1 handling fee will be charged on orders under $5 if payment is not enclosed)
EDRS PRICE	MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS	Confidential Records; Corporal Punishment; Court Litigation; Discipline Policy; Dress Codes; Expulsion; Freedom of Speech; Married Students; Pregnant Students; *School Law; Search and Seizure; Student Responsibility; *Student Rights; Suspension

ABSTRACT

Educators have broad powers when maintaining student discipline. As long as there is no blatant violation of students' constitutional rights, courts are reluctant to interfere. Still, there are limits to an educator's prerogatives. This document discusses students' rights in the areas of corporal punishment, suspension and expulsion, searches and seizures, married and pregnant students, the First Amendment, dress codes, grading and graduation policies, and confidential records. Relevant precedent-setting court cases are identified and discussed. The document concludes with the observation that the most important actions educators can take in creating an adequate discipline policy are the establishment of reasonable rules and the communication of those rules to students through a well-distributed handbook. (Author/PGD)

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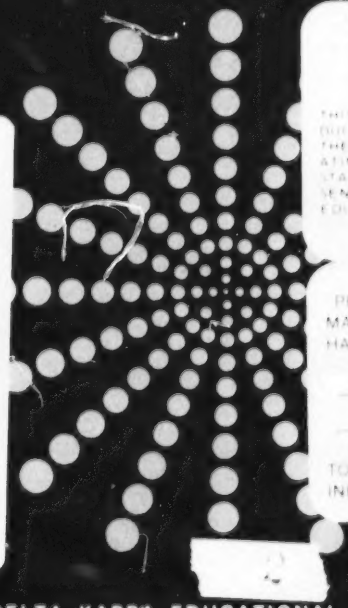
Student Discipline and the Law

Eugene T. Connors

FASTBACK 121



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Student Discipline and the Law

By Eugene T. Connors

Library of Congress Catalog Card Number: 79-83625
ISBN 0-87367-121-X
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Bloomington, Indiana

This fastback is sponsored by the Columbia University Chapter of Phi Delta Kappa, which made a generous financial contribution toward publication costs.

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Introduction

The era when teachers and administrators had almost unlimited control over a student's behavior is a quickly vanishing memory. Since the early 1960s, students and their parents have been requiring educators to defend their scope of control over student behavior in courts of law. Student activism, a greater awareness of legal rights, and the effects of a litigation-conscious society are possible reasons for these legal challenges of educators' heretofore "right to discipline." In any case, the entire area of student discipline and the law has become so complex that few educators are aware of the legal status of their rules governing student conduct.

This fastback will establish some general guidelines for teachers and administrators to follow when disciplining students. While the law is frequently complex, some fairly simple rules of thumb can be gleaned from an examination of state and federal court cases concerning the legality of student discipline procedures. Indeed, since 1975, the U.S. Supreme Court has rendered several decisions on discipline issues that have helped to clarify educators' legal rights in such matters as student suspension, expulsions, corporal punishment, searches and seizure, free speech, dress codes, confidentiality of student records, and other legal issues.

Corporal Punishment

Corporal punishment is a topic that often creates controversy among both educators and laypersons. While the banning of corporal punishment in schools has occurred in many places, several states still authorize use of corporal punishment as a means of controlling student behavior. Without debating the pros and cons of this controversial topic, the mere fact that many educators believe in and use this method of discipline requires that some objective examination of the legal requirements in the administering of corporal punishment be provided.

Federal Issues

The U.S. Supreme Court recently heard two cases dealing with the issue of corporal punishment. The more famous of these cases was *Ingraham* v. *Wright*, 97 S.Ct. 1401 (1977). This case dealt with the issues of excessive punishment and whether or not such punishment violated the cruel and unusual punishment clause of the Eighth Amendment.

The case came from Dade County, Florida, where the use of corporal punishment is specifically authorized by school board policy. The policy also contained explicit limitations in the administering of corporal punishment. In the fall of 1970, two students were subjected to an alleged abuse of corporal punishment. One student was struck 20 times with a flat wooden paddle because he was slow in responding to his teacher's instructions (15 more than the school board policy authorized). The other student was paddled so severely on his arms that he lost full use of his arms for over a week.

The case came to the U.S. Supreme Court with two issues: First, was the use of corporal punishment in violation of the Eighth Amendment

(which prohibits the use of cruel and unusual punishment)? And second, was some type of procedural due process required before a teacher or other disciplinarian could administer corporal punishment?

The Supreme Court found, in a five-to-four decision, that the use of corporal punishment in schools is *not* in violation of the Eighth Amendment. Therefore, corporal punishment is *not* cruel and unusual punishment. Concerning the matter of a due process hearing, the court said:

> We conclude that the Due Process Clause does not require notice and a hearing prior to the imposition of corporal punishment in the public schools, as that practice is authorized and limited by the common law.

The Court did assume, however, that if a student denied having committed the infraction, the disciplinarian would investigate the facts before proceeding with the punishment.

In summary of the *Ingraham* v. *Wright* decision, then, corporal punishment does not violate the Eighth Amendment barring cruel and unusual punishment; nor does its use require a formal due process hearing (although an informal investigation of facts was encouraged). Consequently, educators may use corporal punishment without fear of becoming entangled in a federal suit.

Parents' Rights

The second case that the U.S. Supreme Court heard in connection with the corporal punishment issue concerned parents' rights in restricting the use of such punishment on their children. In 1975 the high Court let stand a decision by a federal district court in North Carolina in *Baker* v. *Owen*, 395 F. Supp. 294 (M.D. N.C.) (1975), *aff'd* 423 U.S. 907 (1976).

In this case, a parent sought to restrict the use of corporal punishment on her child by school authorities. While the Court agreed with the premise that parents have a fundamental right in choosing the appropriate disciplinary techniques for their children, it did not ascribe to the argument that these rights extended into the school. Indeed, the Court upheld the right of educators to administer corporal punishment even though the parents objected to such punishment.

The Court did, however, outline some minimal due process require-

ments before the administering of corporal punishment. The due process procedure must conform to the following three steps:

> (a) Except for those acts of misconduct which are so antisocial or disruptive in nature as to shock the conscience, corporal punishment may never be used unless the student was informed beforehand that specific misbehavior could occasion its use, and, subject to this exception, it should never be employed as a first line of punishment for misbehavior. The requirements of an announced possibility of corporal punishment and an attempt to modify behavior by some other means—keeping after school, assigning extra work, or some other punishment—will insure that the child has clear notice that certain behavior subjects him to physical punishment.
>
> (b) A teacher or principal may punish corporally only in the presence of a second school official (teacher or principal), who must be informed beforehand and in the student's presence of the reason for the punishment. The student need not be afforded a formal opportunity to present his side to the second official; this requirement is intended only to allow a student to protest, spontaneously, an egregiously arbitrary or contrived application of punishment.
>
> (c) An official who has administered such punishment must provide the child's parent, upon request, a written explanation of his reasons and the name of the second official who was present.
>
> *Baker* v. *Owen*

Therefore, while *Ingraham* v. *Wright* established that no formal due process hearing is required *before* administering corporal punishment, the high Court's affirmation of the district court's ruling in *Baker* v. *Owen* provides the following due process:

1. Corporal punishment, generally, should not be used in a first-offense situation.
2. The students should be aware of what misbehaviors could lead to corporal punishment.
3. Another adult witness should be present during the administration of corporal punishment.
4. The student should be told (in front of the adult witness) the reason for the punishment.
5. Upon request, the disciplinarian should inform the student's parents of the reasons for such punishment.

Corporal punishment is not in violation of the Eighth Amendment,

its use does not require a formal hearing, and parents have no right in attempting to restrict educators' use of corporal punishment on their children. Therefore, the use of corporal punishment is not banned or restricted in any way by the federal laws or federal courts as long as the relatively simple due process procedures outlined above are followed.

State Laws

While the federal government's involvement in corporal punishment is minimal, state governments have a great deal to do with this issue. Several states, in one form or another, have banned the use of corporal punishment. Maryland's state school board prohibits the use of corporal punishment by board policy; Massachusetts and New Jersey prohibit corporal punishment by state statute. It is settled law that the state has the legal right to restrict the use of corporal punishment. *In those states where corporal punishment is banned, the use of corporal punishment is illegal.*

Other states have statutes that specifically authorize the use of corporal punishment. In these states, the use of corporal punishment is permitted. In those states where there are no state laws, regulations, or policies in regard to corporal punishment, it is assumed that its use is legal.

Local Policies

In many states that either authorize the use of corporal punishment or have no state control over the issue, the local school board can develop policies governing corporal punishment. Some school board policies restrict the use of corporal punishment or ban it altogether. In other instances, board policies may establish strict procedures in administering corporal punishment.

In one state, Virginia, local school boards cannot restrict or ban corporal punishment from schools since state statute specifically authorizes it. An opinion by the attorney general asserts that teachers and principals have the right to use corporal punishment in this state. Therefore, before educators consider using corporal punishment as a means of discipline, they should check local board policy and state laws to determine if such punishment is restricted or banned. If state laws and local board

policy permit the use of corporal punishment, then it may be used as long as it meets the standards set forth in the *Baker* v. *Owen* decision. If local board policy or state law further restricts the use of corporal punishment, then these policies or laws are also applicable. One such common restriction is that only principals or vice-principals are authorized to administer corporal punishment. Many states do not permit teachers to use this disciplinary practice.

Liabilities

Even though the use of corporal punishment may not be restricted by state law or local board policy, the abuse of this disciplinary technique can have serious consequences. Indeed, in *Ingraham* v. *Wright*, the high Court suggested that excessive corporal punishment may well violate various state statutes (child abuse, assault, battery) and complainants could seek civil action as well.

There is no exact point at which the use of corporal punishment becomes excessive. Such a determination is based on time, society's attitudes, and local values. However, almost every state statute that authorizes the use of corporal punishment contains a statement that such punishment cannot be "excessive," "unreasonable," "with malice," or some other restrictive phrase. The state is not going to permit educators to abuse or harm students with impunity under state laws.

What factors, then, might be taken into account in determining if corporal punishment is "excessive" or not? One might want to consider 1) the gravity of the offense, 2) the frequency of the offense, 3) the age of the student, 4) the size of the student, 5) the size of the disciplinarian, 6) the implement used in delivering corporal punishment, 7) the attitude and disposition of the disciplinarian, and 8) the sex of the student. As one law professor puts it, "No matter how big the student is, and how small the teacher is, when standing before a judge, the student looks a lot smaller and the teacher a lot bigger."

Several courts throughout the country have addressed the issue of excessive corporal punishment. While none have developed "absolute" standards, several have provided guidelines for the point at which corporal punishment becomes excessive or unreasonable.

1. More than three whacks with a paddle.

2. If the punishment leaves a bruise or mark.
3. If the punishment is applied anywhere else than the buttock.
4. If the punishment causes a temporary physical injury.
5. If the punishment causes any type of permanent injury.

The use of corporal punishment is a high liability practice. What may appear reasonable and prudent at the time of the offense may appear unreasonable and excessive in a courtroom. It is suggested that in administering corporal punishment, the educator be calm, collected, reasonable, and prudent. One court cited that anger (of the disciplinarian) alone constituted unreasonableness.

Suspension and Expulsion

Two of the most frequently used ways that educators have found for controlling students are suspension and expulsion. Various courts have made a legal distinction between suspensions and expulsions. Suspensions are a temporary separation from an educational institution or the educational process. Expulsions are considered to be a final and permanent separation. Courts have consistently ruled that educators have the right to suspend or expel students from school. It is the manner or procedure of suspending or expelling that frequently leads to litigation. In other words, it is *how* we suspend that is important.

Suspensions

There are basically four types of suspensions: short-term, long-term, indefinite, and extracurricular activity suspensions. The following sections will provide an analysis and guidelines for each of these types of suspensions.

Short-Term Suspensions. A short-term suspension is an involuntary absence on the part of the pupil from either school or the educational process for a period of 10 days or less. Previous to 1975, the entire area of short term suspensions was unsettled due to the diversity of various court decisions. Some courts held that students could not be suspended for more than three days without a formal hearing (other courts said five, eight, 10, and 15 days). Still other courts held that no hearing of any kind was necessary in order to suspend students. This situation continued to remain chaotic until the U.S. Supreme Court issued an opinion in *Goss* v. *Lopez*, 419 U.S. 565 (1975). The decision in this case helped to establish guidelines for short-term suspensions from school.

The case dealt with widespread student disruption in the Columbus,

Ohio, school system in the spring of 1971. Various students were suspended from school for a 10-day period for disruptive or disobedient conduct. The students were suspended immediately upon being caught without receiving any type of hearing. It was primarily the issue of a hearing that concerned the high Court. One of the plaintiffs in the case, Dwight Lopez, charged that he was an innocent bystander in a school lunchroom disturbance but was suspended without ever having the opportunity to explain his side of the story. Several other students made similar allegations.

In examining the case, the Supreme Court looked at the issue of procedural due process. The Fourteenth Amendment to the U.S. Constitution says (in part):

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law;

So the Court had to decide if the students were entitled to due process. It found that:

> Neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation . . . is *so insubstantial* that suspensions may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary (italics added).

Since the Court viewed the educational process as a property right, due process (as specified by the Fourteenth Amendment) is applicable.

> At the very minimum, therefore, students facing suspension and the consequent interference with a protected property interest must be given *some* kind of notice and afforded *some* kind of hearing (Court's italics).

Therefore, the U.S. Supreme Court decided that even for short-term suspensions, students have the right to some type of minimal due process hearing. Fortunately, the Court proceeded to outline what type of hearing is required.

> Students facing temporary suspension have interest qualifying for protection of the Due Process Clause, and due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story. The clause requires at least these rudimen-

tary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school.

The Court went on to explain that such a due process hearing could be informal and there need not be any delay between "the time the 'notice' is given and the time of the hearing." The Court was simply requiring disciplinarians to be fair-minded before imposing suspensions. It was felt that "requiring effective notice and an informal hearing permitting the student to give his version of the events will provide a meaningful hedge against erroneous action."

This case, then, has determined that students have the right to a procedural due process hearing for suspensions of 10 days or less. However, the hearing may be informal and conducted quickly so as not to limit the school's disciplinary authority. Therefore, before a student can be suspended for 10 days or less (a short-term suspension), the following guidelines should be met in an informal situation:

1. The disciplinarian should inform the student as to what rule he or she broke.
2. The disciplinarian should tell the student how he or she became aware of the fact that the student broke the rule.
3. The disciplinarian should give the student an opportunity to tell his or her side of the story.
4. If there are contradicting facts, the disciplinarian should at least make a rudimentary check on the facts before imposing a suspension.
5. A student should not be suspended for more than 10 days.

The Court does not require a formal hearing with legal counsel and witnesses—just an informal give-and-take prior to the suspension.

The Court had no intention of imposing inappropriate requirements on educators. In relatively simple situations, these due process requirements can be met in a matter of a few minutes. Educators should not feel oppressed by these requirements. Rather, they should feel relieved at having some universally acceptable standards for short-term suspensions.

Long-Term Suspensions. While the Supreme Court provided guidelines for educators in administering short-term suspensions, no single court has done so for long-term suspensions. However, basic re-

quirements can easily be gleaned from various courts' decisions concerning such suspensions.

A long-term suspension is an involuntary absence from school or the educational process by a pupil for more than 10 days but for a specified period of time. Suspensions of three weeks, six weeks, a term, a semester, even an entire school year are considered long-term, as long as there is a specified termination date of the suspension at which the pupil may return to school.

While the due process requirements for short-term suspensions are informal and relatively simple, such is not the case for long-term suspensions. The courts have generally held that a long-term suspension requires a more formal hearing since the interference with the educational property interest is more pronounced.

The following steps are the basic procedures needed to comply with long-term suspension guidelines:

1. The student and parents should be given written notice of the charges against him.
2. A hearing date should be scheduled giving the student enough time to prepare a defense—but not too far in advance to damage his property interest. It is suggested that this hearing be scheduled within two weeks of the date of the infraction (unless the student requests otherwise).
3. At the hearing, the student has the right to be represented by legal counsel.
4. At the hearing, the student has the right to face his accusers.
5. At the hearing, the student has the right to cross-examine witnesses.
6. At the hearing, the student has the right to present a defense. This includes calling witnesses and presenting evidence.
7. The student has the right to an impartial tribunal at the hearing. This requirement has been the subject of much litigation in the last 10 years. While some courts hold that the school principal is an "impartial" judge, it is recommended that some adult(s) totally unfamiliar with the incident be used for the tribunal. Citizen advisory groups are especially valuable for this purpose.

8. The decision of the tribunal must be based solely on the facts presented at the hearing. A student cannot be suspended for something that is unrelated to the infraction that instigated the hearing.

If the student is to be represented by legal counsel, no educator should ever attempt to represent the school. The school system attorney should be called in immediately to represent the school. The average principal or teacher is no match for a competent attorney at a hearing. Students who are going to be represented by an attorney can be made to give advance notice of that fact so that the school may acquire its own legal counsel.

At the time of the infraction (or when notice of the charges is being issued), the student and parents should be made aware of the student's rights. While the procedures for long-term suspensions may seem overwhelming, remember that courts tend to be paternal when dealing with students who are faced with long-term suspensions. The school's procedures will be scrutinized closely. The school and its representatives must be absolutely free from any malice or unreasonable actions whether they be intentional or unintentional.

Because of the detailed procedures that establish a "trial-like" atmosphere, many educators are reluctant to go through the turmoil involved in a long-term suspension. It is much easier and faster to issue a 10-day, short-term suspension than a four- or five-week suspension. In light of the above discussion, this situation is understandable.

Indefinite Suspensions. There are times when a student's simple presence in school may endanger either his own well-being or the well-being of others. In such cases, the courts have authorized the use of the "indefinite suspension." This is a suspension where a hearing is not practical; a student must be removed from the school premises immediately. Indefinite suspensions are a temporary measure to remove a student from a potentially harmful situation (he may either be the cause or the victim of the harmful situation). They are usually followed up with an informal hearing for short-term suspension, a formal hearing for long-term suspension, or expulsion proceedings. It is important to remember that the indefinite suspension is simply a temporary measure to protect the well-being of the student (or student body).

In the previously mentioned case, *Goss* v. *Lopez*, the Supreme Court spoke to the issue of indefinite suspensions:

> Students whose presence pose a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from the school. In such cases, the necessary notice and rudimentary hearing should follow as soon as practicable.

Therefore, educators should feel free to utilize the indefinite suspension in "unusual" situations. However, some type of hearing is still necessary depending on the length of the suspension.

Extracurricular Activity Suspensions. In the past, many principals and teachers have regarded extracurricular activities as a privilege that can be denied in a disciplinary action. This practice is quickly coming to an end. Court after court has upheld students' rights in extracurricular activities because such activities are now increasingly considered an integral part of the educational program. As a result of this trend, courts have tended to apply the same standards to suspensions from these activities as they do for suspensions from required school courses. If a student is to be suspended from an extracurricular activity, he has the same procedural due process rights as when being suspended from school.

In other words, if a student is suspended from some extracurricular club or activity for 10 days or less, he must be given the same informal hearing as discussed in the *Goss* v. *Lopez* case. If a student is suspended from some club or activity for a period longer than 10 days, the formal hearing discussed in the section on *Long-Term Suspension* would be required.

This does not necessarily restrict an educator's control over extracurricular activities. The courts are still hesitant to rule against educators setting reasonable rules for membership in clubs or activities. Principals and activity sponsors still have the right to make reasonable rules for participation in clubs or activities. Such rules may even encompass membership criteria. It is the imposing of a suspension, either short- or long-term, that brings the procedural due process issue into play.

So if educators wish to make reasonable rules and regulations for

club or activity membership, they may do so without fear of legal reprisal. However, if students are to be suspended from any extracurricular activity for misbehavior, misconduct, or disruption, then either the short- or long-term suspension procedures are applicable.

Expulsions

It is generally accepted that the school board has the power to make reasonable rules and regulations governing student conduct. Therefore, when students blatantly and consistently violate such reasonable rules, the courts have supported school boards' rights to permanently expel students from school.

Expulsion is a permanent denial of the educational rights. Since it is the most serious action that educators can take against pupils (an educational capital punishment), the courts require very strict procedural due process guidelines.

While the procedures in due process for expulsions vary widely throughout the country, several rules of thumb can be extracted in an attempt to provide educators with guidelines. It is generally accepted that neither principals nor teachers can expel students. The courts have generally held this action to be a school board prerogative. Principals and teachers can only recommend students for expulsion. Courts will frequently review student expulsion cases in an attempt to determine if the infraction is serious enough or has been repeated enough times to indicate that the pupil has abused his right to the educational process.

Most school boards have highly detailed hearing procedures for expulsions. In most states, the school board sits as the impartial tribunal with the school employees presenting their case. Frequently the school system attorney is used as spokesperson for the educators in an attempt to provide strict procedural protections.

All in all, expulsions are highly technical hearings governed, primarily, by school board procedures. It is recommended that before any educator embarks on an expulsion hearing, local school board regulations and state laws should be closely examined for guidelines for just cause and procedural requirements.

Searches and Seizures

One of the most unpleasant, yet most important duties of educational administration is keeping the schools free from contraband. With the recent rise in juvenile drug use and the problems concerning violence in the schools, the use of searches and seizures in school is becoming more pronounced.

There are many types of items that do not belong in school. Drugs and their paraphernalia are not permitted in school; nor are weapons such as knives, guns, and brass knuckles. Blatantly obscene material in the form of magazines, newspapers, and pictures are also usually banned from school. To insure that these items are not in school requires the use of search and seizure. Searches are defined as the looking for contraband. Seizures are the taking of contraband.

The processes of searching and seizing, however, can conflict with the Fourth Amendment to the U.S. Constitution, which states:

> The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

In some cases educators are bound by the restrictions of the Fourth Amendment and in other cases they are not. The following sections will provide guidelines to determine which instances require a search warrant and/or probable cause in order to conduct a search or seizure and which instances do not.

In Loco Parentis

The legal principle of *in loco parentis* establishes several rights of educators when dealing with students. *In loco parentis* means "in the place of the parents." Educators stand "in the place of the parents" when supervising children in school.

In terms of searches and seizures, the *in loco parentis* doctrine works two ways. First, it can be said that parents would not want their child to be in possession of dangerous or obscene items. Consequently, in searching and seizing contraband, the educator is simply doing what the parent would do. The second method in which the *in loco parentis* doctrine affects searches and seizures is in a collective sense. Some parents have maintained that the searching, seizing, and turning over of contraband to police for prosecution is *not* acting in the place of the parent for no parent would do such a thing to his child. While this argument is valid, courts have held educators *in loco parentis* for the entire student body. Therefore, the well-being of all the students must be insured—even if educators act contrary to the *in loco parentis* doctrine for a single student. This collective use of the *in loco parentis* doctrine strengthens educators' rights to make searches and seizures for contraband and to turn such contraband over to police for appropriate action.

Searching Students' Lockers and Desks

The searching of students' lockers and desks is quite different from the searching of students. In fact, an entirely different set of legal standards are in force.

Over the years, the courts have been remarkably consistent in their rulings regarding the searching of students' lockers and desks. Almost every court faced with this issue has held that such searches are a legal *duty* of school administrators. Consequently, any evidence seized in such searches may be used against students.

There are three major court cases that establish the administrator's legal right to search student lockers and desks. *State of Kansas* v. *Stein*, 456 P.2d. 1, 203 Kan. 638 (1969), is a case in which a student was believed to have stolen property in his locker. Police officers came to the school and with the consent of the principal and the student searched

the locker. A key found in the locker led to the evidence responsible for the student's conviction.

The accused student appealed the conviction, claiming that he should have been warned about his legal rights before his locker was searched and that the principal had no right to open the locker for the police.

The supreme court of Kansas ruled that such a warning is not needed in search and seizure cases and that a principal does have the right to open and search a student's locker because the principal is responsible for its content as well as being responsible for the other students' welfare. Concerning the status of a student's locker, the court stated:

> Although a student may have control of his school locker as against fellow students, his possession is not exclusive against the school and its officials. A school does not supply its students with lockers for illicit use in harboring pilfered property or harmful substances. We deem it a proper function of school authorities to inspect the lockers under their control and to prevent their use in illicit ways or for illegal purposes. We believe this right of inspection is inherent in the authority vested in school administrators and that the same must be retained and exercised in the management of our schools if their educational functions are to be maintained and the welfare of the student bodies preserved.
>
> *Kansas* v. *Stein*

Therefore, the court held that students' lockers can be searched by school authorities without a search warrant or probable cause.

Probably the most famous search and seizure case is *People* v. *Overton*, 229 N.E. 2d. 596, 20 N.Y. 2d. 360 (1967). Detectives, after having obtained a search warrant, came to Mt. Vernon High School and asked the assistant principal to call two students to the office. Carlos Overton was brought to the office and searched by the detectives. Nothing was found. The detectives then asked the assistant principal to open Overton's locker. The school administrator did so, and the detectives found four marijuana cigarettes. The student was then arrested.

In the New York District Court, the student defendant's attorneys moved to invalidate that portion of the search warrant that directed that his locker be searched on the grounds that the warrant was defective. The motion was granted, but the court held that the evidence was

still admissible because the assistant principal had consented to the search and had the right to do so. The New York Appellate Court reversed and dismissed the ruling. It stated that the assistant principal's consent could not justify an otherwise illegal search.

The State then appealed the case to the New York Court of Appeals. This court saw two distinct issues in the case. First, were the Fourth Amendment's restrictions applicable to school lockers; and second, does a school administrator have the right to search a locker? The Court of Appeals reversed the appellate court's decision, and in doing so, upheld the district court's ruling. The Court of Appeals was convinced that school lockers are not protected by the Fourth Amendment and, therefore, no search warrant is required in order to inspect them, nor was prior consent of the student needed. The court maintained that the assistant principal was acting *in loco parentis*.

> The school authorities have an obligation to maintain discipline over the students. It is recognized that, when large numbers of teenagers are gathered together in such an environment, their inexperience and lack of mature judgment can often create hazards to each other. Parents, who surrender their children to this type of environment in order that they may continue developing both intellectually and socially, have a right to expect certain safeguards.

The court in the *Overton* case upheld the right of a school administrator to search a student's locker without verbal or written consent of the student because the holding of the key or the combination to the locker implies prior knowledge and consent of the student to such actions. It can, therefore, be said that a principal or vice-principal is also entitled to access to a student's locker since he is ultimately responsible for its contents, as well as for the welfare of the other students in the school. Lockers and desks are considered to be school property and, as such, are under the supervision of the building principal.

Not only may a principal or designated staff member search a student's locker or desk, but he may also give permission to the police for a search—even without a search warrant. Since the courts have held that the lockers and desks are essentially the principal's property, a principal may voluntarily open his property to a police search at any time.

It is highly recommended, however, that students be made aware

that they do *not* own the lockers, and that lockers and desks may be searched by school authorities at any time, for any reason, without prior notification. Some schools require students to sign a form stating that they are aware that the use of a school locker is a privilege, not a right, and that while the locker cannot be opened by other students, it may be opened by school authorities. Even though such a form is not necessary, it could clear up any misunderstanding regarding search and seizure laws as they apply to student lockers.

Probable Cause or Reasonable Suspicion

Before beginning discussion on the searching of students' persons, purses, coats, etc., a technical and precise legal distinction must be made. This distinction is the difference between *probable cause* and *reasonable suspicion* and is applicable *only* to searches of students' persons, purses, coats, and other personal belongings and *not* to lockers and desks.

In terms of searches and seizures, *Black's Law Dictionary* defines probable cause as meaning "reasonable ground of suspicion, supported by circumstances sufficiently strong to warrant cautious man in believing party is guilty of offense charged." Probable cause for searching frequently requires the testimony of some reliable person as to what contraband is possessed and where it is hidden. All law enforcement officials (police, sheriff, FBI, treasury agents) are required to have probable cause or a search warrant before searching a person or his private property.

Reasonable suspicion, on the other hand, is a much less stringent requirement. It simply requires the party who will be conducting the search to have a "reasonable reason to suspect" that contraband may be hidden on a person or in his private property. Courts have held that educators who are *not* acting with the knowledge or consent of a law enforcement agency only need reasonable suspicion to conduct a search. This reasonable suspicion standard evolved out of the "exclusion principle" that was cited by one court in an educational search and seizure case:

> Consequently, whenever evidence is seized by a private person, without

the knowledge or participation of any governmental agency, it is admissible in a criminal prosecution.

People v. *Stewart* 313 N.Y. 5d. 253 (1970)

Therefore, as long as a principal is acting as a private person (as opposed to an agent of a law enforcement agency), a legal search and seizure can be conducted with reasonable suspicion.

Searching Students and/or Their Private Property

The courts have held that under certain circumstances principals can search students or their private possessions. However, if a principal receives information from a law enforcement agency that may lead to a search of students or their personal property, the principal *must* have probable cause or a search warrant in order to conduct that search. The reasoning behind this ruling is that the principal is acting as an extension of a law enforcement agency.

However, if a principal receives information from a *nonlaw* enforcement agency source that may lead to a search of students or their personal property, then the principal only needs reasonable suspicion to conduct the search. At least two courts have spoken specifically to the issue of the reasonable suspicion standard.

I, therefore, conclude that . . . no arbitrary invasion of the defendant's privacy resulted. On the contrary, the search and seizure, based at least upon reasonable grounds for suspecting that something unlawful was being committed, or about to be committed, must be deemed a reasonable search and seizure within the intention of the Fourth Amendment.

People v. *Jackson* 319 N.Y. 2d. 781 (1971)

I conclude, as did the majority in *People* v. *Jackson* that "(t)he *in loco parentis* doctrine is so compelling in light of public necessity and as social concept antedating the Fourth Amendment, that . . . a search, taken thereunder upon reasonable suspicion should be accepted as necessary and reasonable."

State v. *Baccino* 282 A. 2d. 869 (1971)

Therefore, U.S. courts have endorsed the "exclusion" principle and have developed a specific standard for educators regarding the Fourth Amendment. That standard is that in absence of the knowledge or consent of law enforcement agencies, a school principal can conduct a legal search and seizure with only reasonable suspicion.

It is not recommended that teachers undertake the searching of students or their possessions. This act is an administrator's prerogative. Principals are advised to attempt to persuade a student to empty his pockets (purse, coat, etc.) voluntarily. If persuasion fails, then a forceable search may be conducted as long as the principal has reasonable suspicion. Male principals should *never* attempt to search a female student. A female administrator or teacher should be asked to conduct the search. Likewise, female principals should not search male students.

In general, then, the courts have been quite lenient in allowing school officials to conduct searches and seizures. The *in loco parentis* doctrine and the "exclusion principle" provide a sound legal basis for such administrator rights.

Regulations Governing Married and/or Pregnant Students

The issues surrounding school discipline and control of married or pregnant students involve personal values, morals, and community standards. Prior to the 1960s educators had great control over these students while in school. Usually, if a student became pregnant or married, exclusion from school was the rule. There were many reasons for seeking such exclusions—some valid, some arbitrary. Some administrators worried about the presence of married students in public schools contributing to "moral pollution" as a consequence of married students discussing their marital (sexual) life with other students. Other administrators argued (with convincing data) that teen-age marriages had extremely high divorce rates. Thus, they believed that by refusing to allow married students to attend school, they were discouraging students from marrying at such an early age. They also argued that unwed mothers or unwed pregnant students were a source of embarrassment to the school.

Some school boards had regulations permitting married or pregnant students to attend classes but not to take part in any extracurricular activities. They claimed that extracurricular activities were not a right of education and that students, upon getting married, forfeited the privilege of participating in extracurricular activities. Many officials also claimed that marriage adds more responsibilities to a student's life, and by participating in extracurricular activities, the student might be neglecting some vital marital responsibility.

Until the 1960s the courts usually upheld such regulations as being reasonable. Educators generally were given a free hand in dealing with the (sometimes) embarrassing situation of pregnant or married stu-

dents. In the 1960s, however, the federal and state courts began to change their rulings. Probably due to the new "liberalness" of the times, most courts began taking a more humanistic view of such issues. Many of the old regulations governing pregnant and married students were struck down with regularity. Between 1964 and 1972 there was a significant rise in court cases that firmly established the rights of pregnant and married students.

Unwed Mothers and Pregnant Students

Educators frequently feel uncomfortable about having unwed mothers and pregnant students in school because they are afraid the community might not approve. They feel the good image of the school is often threatened. However, the courts have spoken with strong opposition to these feelings since 1960. There have been two major cases that have established the rights of pregnant students or unwed mothers concerning their attendance in public schools.

In 1969 the U.S. District Court in Mississippi decided *Perry* v. *Grenada Municipal Separate School District*, 300 F. Supp. 748. In this case two unwed mothers filed a class action suit against the school board charging invidious discrimination that violates the Equal Protection Clause of the Fourteenth Amendment. The board had adopted a policy forbidding unwed mothers to attend school.

The district court ruled that the school must supply a hearing before any student is refused an education. In the court's view,

> The continued exclusion of a girl without a hearing or some other opportunity to demonstrate her qualification for readmission serves no useful purpose and works an obvious hardship on the individual. It is arbitrary in that the individual is forever barred from seeking a high school education. Without a high school education, the individual is ill equipped for life and is prevented from seeking higher education.

The fact that the two girls were unwed mothers is immaterial in such a hearing, said the court, unless the school can prove that they are "lacking in moral character." In conclusion, the court held:

> . . . that plaintiffs may not be excluded from the schools of the district for the sole reason that they are unwed mothers; and that plaintiffs are entitled to readmission unless on a fair hearing before the school author-

ities they are found to be so lacking in moral character that their presence in the schools will taint the education of other students.

The court ruled that in absence of specific evidence attesting to her immorality, a school board cannot exclude a student from school simply because she is pregnant or an unwed mother. In fact, the court felt that such students should be urged to continue their education in order to be better parents.

In 1971 the U.S. District Court in Massachusetts decided a landmark case concerning the educational rights of pregnant or unwed students. *Ordway* v. *Hargraves*, 323 F. Supp. 1155, established strong legal precedent restricting educators' control over pregnant students. Fay Ordway was excluded from attending school or using school facilities during regular school hours because she was unwed and pregnant. The principal of her high school set the following conditions for Fay:

1. She was not permitted to attend school.
2. She could use school facilities (guidance, etc.) but only after regular school hours.
3. She was allowed to attend all school functions.
4. She was allowed to participate in field trips.
5. She could seek extra help from teachers.
6. She could receive tutoring at no extra cost.
7. Her name remained on the school role.
8. She had to take and pass examinations for her courses in order to receive credit for those courses.

The district court ruled in favor of Ordway continuing in school with the following reasoning: 1) if she were married, she would be permitted to attend school; 2) several doctors and psychiatrists testified that there were no medical reasons why she should not attend school, but there were several psychological reasons why she *should* attend school; and 3) the education that she would have received from the tutors would not be equal to that of her classmates attending school. Therefore, she must be allowed to attend school and all extracurricular functions.

As a result of *Ordway* v. *Hargraves*, educators cannot exclude from school pregnant students (married or unmarried) or unwed mothers

unless they can prove that these students are morally corrupt. No humanistic educator would ever attempt to prove such a thing, and the risk of slander charges is also a valid reason for restraint.

Schools can, however, require pregnant students and mothers to observe the following regulations for health and safety reasons:

1. Inform the school administration of any pregnancy.
2. Submit a doctor's certificate every 30 days attesting that the student is healthy enough to continue in school.
3. After the baby is born and before returning to school, submit a doctor's statement certifying that the student is healthy enough to return to school.

While pregnant students and students who are mothers have the right to attend school (as long as they are within the statutory age limits to do so), it has long been established law that they also have the right *not* to attend school. It is advised that educators give the students the choice of whether to attend school or not.

In many states, courts have ruled that students who elect not to attend school because they are pregnant or mothers have the right to request homebound instruction as long as they are within the state's educational age provisions (4- to 20-years-old in most states). The school system attorney can tell you if this ruling applies in your state.

Married Students

Like the issue of pregnant and unwed mothers, the rights of married students have been consistently upheld by courts since the 1960s. A series of three cases has established a strong precedent in allowing married students to continue their education.

In 1964 a Kentucky court decided *Board of Education of Harrodsburg* v. *Bentley*, 383 S.W. 2d. 677. In this case, a female student who was legally married challenged a school board regulation that required any married student to withdraw from school for a period of one year. It was specified that at the end of the year, the student could re-enter as a special student, but could not participate in any school-related extracurricular activity or social function.

The school board attempted to justify its regulation at a hearing by stating that the purpose of such a regulation was to discourage the

marriage of students. In its decision, the court held that the regulation was invalid because a student needs an education even more after marriage than before since his or her future depends upon the skills that an education provides.

In 1966 a southwestern court was asked to rule on a school board policy prohibiting a married student from attending school. In *Alvin Independent School District* v. *Cooper*, 404 S.W. 2d. 76, a 16-year-old female student became legally married and withdrew from school to have a baby. After the baby was born, the student was in the process of divorcing her husband while attempting to gain re-admission to school. The local school board refused to readmit her.

The court held that as long as the student was within the age limits set by the state constitution for receiving free public education, the school board could not adopt a policy excluding a student from school.

The court then concluded:

> We are of the view that appellants were without legal authority to adopt the rule or policy that excludes the mother of a child from admission to the school if she is of age for which the State furnishes school funds.

A similar case was brought before a Texas court in *Anderson* v. *Canyon Independent School District*, 412 S.W. 2d. 387 (1967). In *Anderson*, a ninth-grade female student married and withdrew from Amarillo Junior High School, established residency in Canyon, Texas, and applied for admission into Canyon Junior High School. School officials refused to admit her because she was married but did agree that she was eligible for admission in all other respects. The court, using *Cooper* as a basis, held that the school board could not legally enforce a rule that conflicted with a higher state law.

In 1972 the Tennessee U.S. District Court decided *Holt* v. *Shelton*, 341 F. Supp. 821. Nancy Kay Holt, a married senior, sought relief from a school rule requiring an automatic five-day suspension for all married students. In this case the rule was followed by the school granting Holt only the privilege of attending classes. No extracurricular activities were permitted. The court ruled for the student saying that the school rule was made to punish marriage, which is a legal and fundamental constitutional right. Said the court,

> More specifically, it now seems settled beyond peradventure that the right to marry is a *fundamental* one.
>
> Any such infringement (on a fundamental right) is constitutionally impermissible unless it is shown to be *necessary* to promote a *compelling* state interest.

The courts, then, have established the rights of married students to attend school as unmarried students do. A school has no right to punish students by excluding them from school because of their legal marriage. Married students also have the right *not* to attend school.

Extracurricular Activities and Married or Pregnant Students

As the above cases have shown, some schools and school boards have regulations which, while allowing married or pregnant students to attend school, do not permit them to participate in extracurricular activities or school-related social functions. This question has also come before the courts.

A U.S. district court, in *Davis* v. *Meek*, 344 F. Supp. 298 (1972), was asked to rule on a school board regulation that prohibited a student's participation in any extracurricular activity if:

1. The student contributed to the pregnancy of any girl out of wedlock;
2. The student was an unmarried pregnant girl;
3. The student was married (regardless of the reasons for the marriage).

According to the court, the regulation was void because the student who brought the suit "had attained a status where his marital privacy might not be invaded by the state."

> It is conceded, however, that extracurricular activities are, in the best modern thinking, an integral and complementary part of the total school program.

Since the extracurricular program cannot be segregated from the total educational program, the court concluded that a school board may not restrict a student's activities because of marital status.

A similar case, *Romans* v. *Crenshaw*, 354 F. Supp. 868 (1972), was decided by another U.S. district court. In this case, a 16-year-old girl was married for 10 months and was in the process of obtaining a di-

vorce when the school principal refused to allow her to participate in the extracurricular activity program. The court ruled in favor of the student, saying that extracurricular activities cannot be disassociated from the regular school program and that school officials do not have the right to restrict a student, regardless of marital status, from participating in the school program. Said the court:

> Any and all extracurricular activities cannot rationally or legally be disassociated from school courses proper where they do or may form an element in future collegiate eligibility or honors as here. Such a practice is not only discriminatory on its face but is fundamentally inconsistent with the state's promise of a public education for its youth upon an equal basis.

Therefore, students cannot be excluded from participating in extracurricular activities solely because they are pregnant, married, or parents.

Discipline and Students' First Amendment Rights

Prior to 1970 educators had almost complete control over disciplining students for being outspoken and for expressing beliefs that were highly unpopular. The 1970s, however, began an era when the federal courts began to scrutinize the issue of regulating student speech and expression. The courts have held, in almost all instances, that educators do not have the power to enforce regulations that infringe upon the First Amendment rights of students.

The First Amendment to the Constitution reads as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

This Amendment is made applicable to the states through the Fourteenth Amendment. Since public school systems are functions of the states, they must abide by the stipulations of the First Amendment.

Can educators exercise any control over students' rights to free expression in the public schools? The answer to this question is yes, under certain conditions. They are permitted to curb any disruption to the operation of the school, as the following court opinions illustrate.

One of the first courts to speak directly to the disruption issue was a Fifth Circuit Court in 1966. In *Burnside* v. *Byars*, 363 F. 2d. 744, the court ruled on the question of whether freedom buttons could be worn by students in school. In their decision the justices stated that students, being citizens, are also entitled to the protection of the First Amendment as long as the exercising of these rights does "not materially and

substantially interfere with the requirements of appropriate discipline in the operation of the school." However, said the court:

> . . . with all of this in mind, we must also emphasize that school officials cannot ignore expressions of feeling with which they do not wish to contend. They cannot infringe on their students' right to free and unrestricted expressions as guaranteed to them under the First Amendment to the Constitution, where the exercise of such rights in the school buildings and school rooms do not materially and substantially interfere with the requirement of appropriate discipline in the operation of the school.

Little did the justices realize that they had set the test for each subsequent case involving infringement of First Amendment rights.

Other courts, following *Burnside*, weighed the issue of infringement of personal rights of expression against the concept of whether the exercising of such rights would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." This phrase would come to have a powerful impact on future cases dealing with the constitutionality of infringement of students' First Amendment rights.

Tinker v. *Des Moines*: A Landmark Case

On February 29, 1969, the U.S. Supreme Court handed down its decision in *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503. The *Tinker* decision had its beginnings in Des Moines, Iowa, in 1965, where a group of parents met and decided to wear black armbands to express their support for a truce in the Vietnam war during the holiday season. Their three children, John Tinker (15), Mary Tinker (13), and Christopher Eckhardt (16) also decided to wear the armbands to school.

Several days before the armbands were to be worn, John Tinker mentioned the students' plan to his journalism teacher. She, in turn, informed the principal who called a special meeting of all the principals in the school district. At this meeting the principals drafted a new regulation prohibiting the wearing of black armbands on school property. It stated that any student found wearing one would be sent home until it was removed. Two days after the adoption of this new regulation, the three students wore black armbands to school and were sent

home. They did not return to school until after the holiday season.

The Tinker parents filed a complaint in the U.S. District Court and asked for an injunction restraining the school principals from enforcing the new regulation.

Following an evidentiary hearing, the court dismissed the complaint and upheld the constitutionality of the principals' actions, saying, in part, "that it was reasonable in order to prevent disturbance of school discipline." By its decision, the district court refused to follow the decision of a similar case brought to the Fifth Circuit Court, in which the court ruled that school officials could not restrict the wearing of freedom buttons unless they "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."

Following the district court decision, the Tinker parents appealed the case to the Eighth Circuit Court of Appeals where the court was equally divided. Therefore, the appellate court sustained the lower court decision. Ultimately, in 1969, the case went to the U.S. Supreme Court.

Abe Fortas, associate justice of the Supreme Court, delivered the opinion for the nation's highest court. The Court ruled in favor of the Tinkers, thus reversing the lower courts' decisions. In his opinion, Justice Fortas meticulously outlined the rights of students and said, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the school house gate." He then warned public school systems and public school administrators when he wrote:

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.

However, Justice Fortas did state emphatically that students may exercise these rights only so long as their expression does not "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."

One outcome of this famous Supreme Court decision is what has come to be called "the *Tinker* test," which states that educators may not attempt to regulate student speech or expression unless they can prove that such speech or expression will certainly lead to "material and substantial disruption" of the educational process. Since the *Tinker* decision in 1969, several other federal courts have ruled on First Amendment issue cases that have helped to clarify exactly what "material and substantial disruption" entails.

In 1970 the Sixth Circuit Court of Appeals in *Guzick* v. *Drebus*, 431 F. 2d. 594, ruled in favor of educators who had prohibited students from wearing antiwar protest buttons to school. The court justified its decision by citing numerous instances of violent disruption in the 70% black, 30% white high school, resulting directly from this political expression by students. This court felt that school officials had proven "materially and substantially" that the operation of the school would be significantly affected if students were allowed to wear such buttons to school. However, the burden of proof was on the school authorities and not on the students. This case illustrates that federal courts do not want to interfere with educators disciplining students when the educational process is in danger of being disrupted.

Attempting to *prove* "material and substantial" disruption before any disruption actually occurs is very difficult. In *Guzick* v. *Drebus* there already had been substantial disruption. In spite of the fact that it may be personally repugnant, it may be the wisest policy for school officials to wait until actual disruption has already occurred before attempting to ban or regulate student expression. In this way, there can be little doubt as to the "material and substantial disruption" incurred.

Given such disruption, there are several guidelines to follow in regulating student expression. The courts always look for indications that regulations controlling student speech are unbiased and applied consistently and fairly.

Student Newspapers

Armbands and buttons are not the only means by which students express themselves in public schools; school newspapers are also a popular medium. In recent years, there have been three major "newspaper" cases decided by U.S. Circuit Courts of Appeals. Before citing the details of these cases, let us look at the source of the problem.

Oftentimes, a school principal will find it necessary to check a high school newspaper before it goes to press. Reasons given for this procedure are: 1) to make sure there is nothing libelous said about other students; 2) to make sure nothing derogatory is said about the school or its personnel; and 3) to make sure that nothing too controversial or obscene is contained within.

In 1971 the Second Circuit Court of Appeals decided *Eisner* v. *Stamford Board of Education*, 440 F. 2d. 803. In this case, some high school students asked the court to rule on the constitutionality of a regulation that required all material to be submitted, before printing, to the school principal. The court stated that school officials had the right of such prior approval if:

1. A strict formal procedure is to be followed in the assessment with a specific period of time allowed for approval;
2. Officials try to forestall disruptions before banishing unpopular views from school grounds.
3. Officials list what types of disruptive actions (and to what degree) are needed before censorship is used.

In essence, the Second Circuit Court of Appeals set up a *screening procedure* for school authorities to follow if prior approval of student publications is required.

The Fifth Circuit Court of Appeals ruled on a "newspaper" case in 1972. In *Shanley* v. *Northeast Independent School District, Bexar County, Texas*, 462 F. 2d. 960, several students were suspended because they violated a school regulation by printing an underground newspaper off school property, with nonschool materials, and then distributed it before and after school hours across the street from the school. The paper, according to the court, was not obscene, libelous, or inflammatory. The court immediately threw the burden of proof upon the school authorities, saying:

When the constitutionality of a school regulation is questioned, it is settled law that the burden of justifying the regulation falls upon the school board.

The court then spoke to the issue of disruption and said:

. . . we must emphasize (in the context of this case) that even reasonably forecast disruption is not per se justification for prior restraint as subsequent punishment of expression afforded to students by the First Amendment.

The court did support the concept of a screening process so long as its purpose was to prevent disruption and not to stifle content. Said the court:

Schools may have regulations which require materials destined for distribution to students be submitted to the school administration prior to distribution. As long as the regulation for prior approval does not operate to stifle the content—screening is to prevent disruption and not to stifle expressions—of any student publication in an unconstitutional manner and is not unreasonably complex or burdensome, the requirement of prior approval would more closely approximate simply a regulation of speech and not a prior restraint.

In summary, the Circuit Court of Appeals stated:

Under the First Amendment and its decisional explication, we conclude that: 1) expression by high school students can be prohibited altogether if it materially and substantially interferes with school activities or with the rights of other students or teachers, or if the school administration can demonstrate reasonable cause to believe that the expression would engender such material and substantial interference; 2) expression by high school students cannot be prohibited solely because other students, teachers, administrators, or parents may disagree with its content; 3) efforts at expression by high school students may be subjected to prior screening under clear and reasonable regulations; and 4) expression by high school students may be limited in manner, place, or time by means of reasonable and equally applied regulations.

A more recent case was decided by the Fourth Circuit Court in 1977: *Gambino* v. *Fairfax County School Board*, 564 F. 2d. 157. This case arose out of an attempt by students to publish in the school newspaper an article that outlined the results of a "sex survey" in the school. The article, "Sexually Active Students Fail To Use Contraception," was

banned by the principal and, subsequently, by the school board. The student editor sued, claiming violation of the First Amendment rights of "freedom of speech" and "freedom of the press." The court ruled against the school board stating:

> Therefore, because the newspaper is not in reality a part of the curriculum of the school, and because it is entitled to First Amendment protection, the power of the School Board to regulate course content will not support its action in this case.

School officials have little control over student newspapers other than a cursory "screening" process.

Regulating Students' Dress and Hair Styles

Since 1960 the changes in dress and hair styles have been varied, and in the view of some, quite radical. Of course, students' dress and hair styles have reflected these quickly changing styles. In most cases, student dress and/or hair styles have not caused great disruption of the educational process. However, the law books are filled with cases where the exception is true. In an attempt to curb dress and hair styles that might disrupt the educational process, many educators have instituted dress codes. And, as dress codes become more prevalent, so, too, have court cases challenging them.

Legal research indicates that there is little difference between a dress code and a hair style code in the eyes of the law. Wherever a dress code can be enforced, a hair style code can be enforced; and wherever a dress code is held unconstitutional, a hair style code may be, too. Legally, there is no distinction between the two types of codes. The determination of where dress codes are legal and illegal is the critical question.

Tinker — Again!

The *Tinker* decision opened the way to litigation on many other student-related issues involving First Amendment rights. Through subsequent court action since 1969, the use of buttons, pins, armbands, and newspapers by students has been established as a mode of self-expression; however, the issue of dress and hair styles as means of expression is still being debated in many courts throughout the country. While in *Tinker* the U.S. Supreme Court held that educators cannot violate a student's right to free speech and free expression, the Court

did not specify exactly what constituted "free expression." The entire issue of dress codes, then, comes down to this: Is the manner in which students dress or wear their hair a means of self-expression? If so, then dress codes are an unconstitutional invasion of students' First Amendment rights. If not, then dress codes can be instituted as a means of regulating student dress.

Since the U.S. Supreme Court did not, and has not, spoken specifically about this issue, lower federal courts have been asked to address the dress code issue. Most dress code cases have been decided at the U.S. Circuit Court of Appeals level. There are 11 federal circuit courts in the U.S. Unfortunately, each court's rulings were different enough so as to create wide geographical differences in the interpretation of the law. Because the law governing the use of dress codes in school varies with each circuit, I will provide a circuit-by-circuit analysis of the situation.

First Circuit Court

The first circuit includes the states of Maine, New Hampshire, Massachusetts, Rhode Island, and the territory of Puerto Rico. In 1970 the First Circuit Court ruled in *Richards* v. *Thurston*, 424 F. 2d. 1281, that regulations limiting the length of hair are invalid. In *Richards*, a male student was dismissed because of long hair. According to the court, the particular hair style that a student wore was a personal right and liberty protected by the Due Process Clause of the Fourteenth Amendment and could only be limited in cases of extreme disruptions caused by that hair style. Therefore, dress and hair style codes are unconstitutional in the first circuit. There are, however, exceptions to this ruling that will be discussed in a later section.

Second Circuit Court

The second circuit includes the states of Vermont, New York, and Connecticut. During the researching of this fastback, I did not find any cases concerning the issue of dress codes that had been ruled upon by the U.S. Court of Appeals for the Second Circuit. However, the *Tinker* decision is valid in this circuit because *Tinker* was handed down by the U.S. Supreme Court, which is jurisdictionally superior. However, the second circuit recently ruled that reasonable dress codes for teachers were not in violation of any constitutional rights. By infer-

ence, then, an educator could assume that dress codes *may* be constitutional in the second circuit.

Third Circuit Court

The states encompassed by the third circuit are Pennsylvania, New Jersey, Delaware, and the territory of the Virgin Islands. There have been several dress code cases ruled upon in the third circuit. However, I have been unable to find any pattern or consistent reasoning from the rulings in this circuit. No standard policy has been stated or implied in this region.

Fourth Circuit Court

States within the fourth circuit are Maryland, West Virginia, Virginia, North Carolina, and South Carolina. In 1972 the Fourth Circuit Court of Appeals ruled on a dress and hair style code case that many legal authorities feel has established quasi-national standards regarding the issue of dress codes. In *Massie* v. *Henry*, 455 F. 2d. 779, several students refused to abide by a dress code that had been designed and approved by the students, parents, teachers, and administrators of Tuscola Senior High School. The students went to court asking that the regulations be ruled invalid.

In its dicta, the court went so far as to state that if the school dress code were enforced, even General Grant, General Lee, Jesus Christ, and all Presidents of the United States (Washington to Wilson) would not "have been permitted to attend Tuscola Senior High School."

The court reaffirmed the notion that long hair is indeed a matter of personal expression and this expression is protected by the Constitution. Speaking directly to the issue of the long hair possibly causing a disturbance because of the reaction of another student, the court said:

> In short, we are inclined to think that faculty leadership in promoting and enforcing an attitude of tolerance rather than one of suppression or derision would obviate the relatively minor disruptions which have occurred.

Therefore, the Fourth Circuit Court of Appeals has ruled that dress codes violate students' First Amendment rights. However, some exceptions can be made to the *Massie* ruling and these will be discussed later.

Fifth Circuit Court

The fifth circuit includes Florida, Georgia, Alabama, Mississippi, Louisiana, Texas, and the Canal Zone. Two major cases involving students' right of dress were decided by the Fifth Circuit Court of Appeals. In 1966 the court ruled in favor of students in *Burnside* v. *Byars* (see page 35). In 1969 the court changed its stand in *Ferrell* v. *Dallas Independent School District*, 392 F. 2d. 697.

In *Ferrell* the court accepted and reinforced the concept that long hair was a constitutionally protected means of self-expression, but upheld the authority of school officials to infringe on this student right if there was a *compelling reason* to do so. School officials had argued that the compelling reason for limiting student expression was a real and imminent danger of extreme disturbance of the educational process. The court was convinced of this, and therefore held for the school officials.

Sixth Circuit Court

Michigan, Ohio, Kentucky, and Tennessee are in the sixth circuit. In 1970 the Sixth Circuit Court of Appeals followed the lead set by the fifth circuit in its decision in *Jackson* v. *Dorrier*, 424 F. 2d. 213. In *Jackson* the disruption and distraction factors were too great to uphold the constitutional rights of students.

However, in a more recent decision, the court struck down a hair style regulation but refused to address the overall issue of constitutionality.

Seventh Circuit Court

The area of the seventh circuit includes the states of Wisconsin, Illinois, and Indiana. The Seventh Circuit Court of Appeals heard two companion cases in 1970. In *Breen* v. *Kahl*, 419 F. 2d. 1034, the court admitted that long hair "may" distract and disrupt school, but "may" is not a sufficient reason to infringe on a constitutional right. And, in *Crews* v. *Cloncs*, school officials were unable to demonstrate that there were sufficient disruptions at the school; therefore, the court held for the students.

Eighth Circuit Court

The following states are in the eighth circuit: North Dakota, South Dakota, Nebraska, Minnesota, Iowa, Missouri, and Arkansas. The Eighth Circuit Court of Appeals, in *Bishop* v. *Colaw*, 450 F. 2d. 1069 (1971), held that long hair was an acceptable means of free expression. Therefore, school officials could not infringe upon that right unless a compelling interest could be shown.

Ninth Circuit Court

The ninth circuit includes Alaska, Guam, Hawaii, Washington, Oregon, Idaho, Montana, California, Nevada, and Arizona. Unlike the eighth circuit court, the Ninth Circuit Court of Appeals ruled in *King* v. *Saddleback Junior College District*, 445 F. 2d. 932 (1971), that a school regulation concerning length of hair did not represent any "substantial constitutional right being infringed upon."

Tenth Circuit Court

Wyoming, Utah, Colorado, Kansas, New Mexico, and Oklahoma are in the tenth circuit. The Tenth Circuit Court of Appeals has expressed an attitude that regards problems of students' dress and hair regulations as too inconsequential to take up the time of a U.S. Circuit Court of Appeal. As such, that court has, on several occasions, refused to rule on any of the cases.

Eleventh Circuit Court

The eleventh circuit is the District of Columbia. This court, like the Third Circuit Court of Appeals, has ruled inconsistently on cases concerning the dress code issue. Consequently, no guidelines can be provided for educators who operate within this circuit.

Summary of Decisions

As the previous discussion illustrates, because of the diversity of these decisions, states located in the first, fourth, seventh, and eighth circuits are prohibited from regulating dress and hair styles among students. States located in the fifth, sixth, and ninth circuits may regulate dress and hair styles. States located in the second and tenth circuits have

no precedents except *Tinker* to rely upon. States within the jurisdiction of the Third and Eleventh Circuit Courts of Appeals will probably not know in which direction to go, since the courts have been inconsistent in dealing with the problem of student dress and hair style codes.

The issue of the constitutionality of dress and hair codes is still undecided despite the U.S. Supreme Court decision in *Tinker* v. *Des Moines Independent Community School District*. However, through court action over the past 10 years, a more liberal view is being taken by the courts. As the cases analyzed reveal, more and more courts are accepting the notion that an individual student's dress is a means of personal expression. Therefore, courts are more reluctant to support school officials in infringing upon these rights.

In most cases reviewed, where courts have upheld school regulations or dress and hair length regulations, school administrators clearly demonstrated a *compelling reason* for the regulations. An example of such a case is *Ferrell* v. *Dallas Independent School District*, in which the principal of the school presented indisputable proof of impending student disruptions should the hair regulation be struck down.

Exceptions

In those areas where the courts have ruled that dress and hair style regulations are unconstitutional, there are some exceptions. In certain instances, educators may regulate student dress and hair styles.

Generally, these exceptions are for health or safety reasons and to avoid material and substantial disruption to education. Health considerations are valid reasons for regulating student apparel. Students can be required to have clean hair, clean clothes, and wear foot apparel while on school property. Similarly, safety considerations may also be taken into account. Shop, art, physical education, and home economics are all classes in which dress and hair style codes may be implemented for safety reasons.

Dress codes can be enforced if failure to abide by them will lead to material and substantial disruption of the educational process. One word of warning, however. Since 1970, the courts have ruled for the students in most dress code cases. If you are contemplating initiating a

dress or hair style code, be sure it is reasonable and related to the educational process. Written rules with the justification included in the rule should be made available to each student. Above all, be reasonable; do not invite litigation on this issue.

Regulating Students' Grades, Diplomas, Graduation, and School Records

Student grades, diplomas, graduation, and school records can be highly complex legal issues. In many instances, there is no clear-cut law or landmark court case that clarifies what is acceptable regulation of these value-laden issues. However, by examining various court cases related to the specific issues, general guidelines can be provided.

Educators have several reasons for wanting to regulate such seemingly objective processes and materials as grades, graduation, diplomas, and school records. Some of these reasons are justifiable while others are obvious attempts at harrassing or demeaning students. Frequently, if a case goes to court, the judge will base his or her decision on the underlying reasons for rules that attempt to regulate such student issues.

Student Grades

Student grading is an issue that has been debated for hundreds of years. The necessity for grades has been questioned by many educators in recent years, while the back-to-the-basics movement has provided ample support for the necessity of grades. Whether grades are good or bad is not at issue here. What is at issue is whether educators should use grades as a means of disciplining students. While the question may seem simple and straightforward, the answer is not.

Before examining the various legalities of regulating student grades, some of my own attitudes need to be revealed for it is certain that they will slant the ensuing discussion. Grades are very specialized criteria in education. They are supposed to denote a student's accomplishment in a particular subject. They are an indication of student

understanding of concepts, facts, and skills. They are not indicators of attendance, although grades may reflect low accomplishment due to poor attendance. They are not indicators of deportment. They are not indicators of whether or not the teacher's personality meshes well with the student's personality. Grades, then, are purely objective, *measurable* indicators of a student's mastery of the material in a given subject area. It is when a grade attempts to become more than this that the issue becomes a legal one.

Courts have been extremely reluctant to hear cases concerning grades. A court will not substitute its judgment for that of educators'. All in all, educators have a free hand in giving student grades. It is when a grade is challenged for not being an objective measure of a student's accomplishments that courts will become involved. As long as teachers can justify the grade on the basis of objective measures (tests, quizzes, reports, papers, quality of homework, class work, etc.), the court will side with the teacher. Such justification entails a certain amount of routine record keeping on the part of the teacher. Most teachers record such objective measurements in a grade book. As long as the student's final grade is indicative of what is contained in the grade book, there is no problem. The grade book itself is ample documentation and justification for a grade. While the court may not find certain grading procedures wise, it will not substitute its judgment for that of a teacher. Relative weights of various assignments in determining a student's grade is a teacher prerogative. A court will not rule a grade "unfair" simply because it does not like the method of arriving at the grade.

Therefore, teachers have great leeway in assigning student grades. As long as the grade is an indication of student mastery of subject skills and content rather than of subjective elements—personality, behavior, and attendance—the courts will rule for the teacher.

Diplomas

While the courts have been reluctant to enter into the area of student grades, such is not the case concerning student diplomas. Most court decisions have shown a remarkable degree of consistency in this area.

There is one primary circumstance where educators get into legal

trouble concerning student diplomas. Such a situation is where the student has completed all the requirements for the diploma, but the school refuses to issue the diploma to the student for a variety of reasons. These reasons may be discipline-related, fee-related, or may be related to student marriage or pregnancy. The courts, in ruling on such cases, have generally held that educators cannot deny the diploma to students if the students have met all the academic qualifications for the diploma. The courts feel that the student has actually "earned" the diploma and, therefore, it must be issued. Withholding a diploma for disciplinary reasons has been held illegal.

The courts also generally agree that schools cannot withhold diplomas due to unpaid fees such as library fines, parking tickets, nonreturn of school books, etc. Again, the courts feel that the student earned the diploma, and it cannot be withheld as a result of unpaid fees. However, students with outstanding debts do not have to be reissued books or materials or be allowed to reregister for school until they pay their outstanding fees.

The courts also have ruled against educators who attempted to withhold the diplomas of students who were pregnant or married. This practice was labeled as blatantly illegal. In general, then, educators cannot withhold a student's diploma for any reason as long as the student has met the requirements for the diploma.

The Graduation Ceremony

Another area closely related to student diplomas is the graduation ceremony. Some educators have attempted to regulate the graduation ceremony in several ways. Attendance at the ceremony is frequently denied to students as a means of discipline. As long as the punishment is reasonable in light of the offense, courts have held that educators may deny a student the right to attend his or her graduation ceremony. On the other hand, some educators have attempted to deny pregnant students the opportunity to partake in the graduation ceremony. This practice is clearly illegal and is prohibited by the courts.

The issue of whether or not a principal can require all students to attend graduation has also been addressed by the courts. They have held that students have the right not to attend graduation as well as

the right to attend. Consequently, educators cannot require students to attend graduation in order to receive their diplomas.

The wearing of ceremonial garb during the graduation ceremony has also been challenged by students. Unfortunately, the courts have not been very consistent in this area. If ceremonial garb is provided at no cost to the student, then it can be required. However, if the students have to pay a rental fee for the garb, then the issue becomes a little more complex. Some states have provisions in their statutes or constitutions about free public education. Some courts have interpreted *free* to mean that students should incur no cost whatsoever for their education. Graduation, being a part of the educational process, should also be free of charge according to these court decisions. Conversely, some courts have held that minor "incidental" fees may be charged of students who enjoy free public education. It is likely that a rental fee for ceremonial garb would be considered incidental by those courts.

Due to the diversity of laws and court decisions, I suggest that educators faced with problems in this area contact their local school board attorney for advice.

School Records

Since 1974 the subject of students' school records has become a very complex issue. There are two primary types of legal restrictions that govern educators' control over student records. Most states have passed legislation of one type or another called "privacy acts" that restrict access to the student file by outsiders but allow the student and/or parents to view the file.

The single most important piece of legislation that affects school records is the Family Educational Rights and Privacy Act of 1974 (PL 93-380). The amendments to this act, which have come to be called the "Buckley Amendments," restrict educators' control over student records in two ways. First, they allow students over 18 years old or parents of students under 18 to inspect the student's entire educational record. This includes teacher comments, special psychological work-ups, grades, attendance records, and standardized test scores. The school has 45 days to comply with a request to see school records. The second way in which this law affects educators is that it forbids the school to allow any

individual (except those immediately involved in the student's education) to have access to the records or to be given any information from the records without the written consent of the student (if over 18) or the student's parents (if the student is under 18).

This law, then, is a double-edged sword. On one hand it opens the file up for student inspection; while on the other hand it restricts access to the file by outsiders.

Liability

The ramifications of this law are many. Since students have a right to see their files, many defamation suits have evolved. Teachers are liable for any comments that they make in a student file. Any malicious attempt to defame or stigmatize a student could easily result in a libel suit. And states' statutes of limitations provide little protection, since courts have ruled that the statute of limitations starts not when the libel is written but when it is discovered by the student. Therefore, a teacher can be sued years after making an indiscrete notation in the student records.

To guard against this type of suit, it is recommended that teachers and administrators never write subjective observations in their students' files. Teachers rarely have the expertise to support such subjective comments. Make only objective, measurable observations. For example, if a teacher finds it necessary to comment on Johnny's tendency toward bullyness, he should *not* say, "Johnny is a bully and enjoys beating on other children." A good lawyer could easily take this teacher to task for such an unsupportable statement. Instead, the teacher should write, "Johnny has been involved in eight fights with other children in the past 10 school days. Most of the other children are smaller than Johnny is." This statement makes no subjective conclusion about Johnny being a bully. It simply and objectively states facts.

Even though teachers have the right to record such objective statements in students' records, it is still unwise to do so. Legally, the best course is to have nothing contained in a student's record file except grades, attendance, standardized test scores, and major disciplinary actions (suspensions and expulsions). The less that is contained in a student's file, the less chance there is of a lawsuit.

One provision of the Buckley Amendment that helps to protect educators somewhat is that the act is not retroactive. In other words, files that had been completed or closed prior to January 1, 1975, are not open to student inspection. However, any file open on that date or thereafter can be reviewed by the student at any future date.

Making Reasonable Rules and Developing a Student Handbook

The previous chapters have examined the legality of disciplinary practices for specific issues. While some issues appear to be highly complex and unrelated to other discipline issues, a general analysis of all issues can provide some useful guidelines for making school rules and for developing student handbooks.

Reasonable Rules

Courts in the U.S. have long held the opinion that educators have the right to make reasonable rules and regulations to expedite the smooth operation of the educational process. Very few (if any) courts will substitute their judgment on educational matters for the judgment of educators. Even the U.S. Supreme Court has said that educators know more about running schools than judges do; and consequently, the courts must respect the judgment of educators even if it appears to be unwise.

While the courts will support educators in the matter of making reasonable rules and regulations, there are two situations in which the courts are reluctant to do so. If a rule or regulation is clearly "unreasonable," the court will strike it down. And, if a rule or regulation conflicts with some basic constitutional right, the courts usually will not support it.

The matter of whether a rule is reasonable or unreasonable is a complex one, with little consistency in judicial decisions. A rule is reasonable if its aim and effect further the smooth operation of the educational process. It is clearly unreasonable if the rule attempts to regu-

late students in a way that has no rational relationship to the educational process. For example, any attempt at controlling students' personal lives while away from school has been held unreasonable.

The creation of reasonable rules is relatively simple. Before making any rule, first determine what the desired outcome should be. Then, examine all alternatives to making rules. If there is any way of handling a particular situation short of making rules, use it. Excessive rules are confusing to students and tend to promote an atmosphere of totalitarianism. If the creation of a rule is necessary, determine exactly what conduct the rule is to regulate. Is this conduct primarily exhibited by any particular ethnic group or sex? If so, be careful that the regulation does not conflict with Title IX (sex discrimination) or any civil rights statutes. Once a rule has been created, it should be written in a clear, understandable statement that is not subject to various interpretations. Students should be made aware of the rule. When the rule is applied, it should be applied fairly and equally without regard to the students' personal characteristics. If the rule, in substance, is fair, then the only area that may lead to litigation is the application of the rule. By treating all students equally in applying the rule, this situation can be easily avoided.

As mentioned previously, any rule that conflicts with higher law is unacceptable to the courts. Therefore, be certain that the written rule conforms to the restrictions of the U.S. Constitution, the state constitution, and state laws. This still gives educators a great deal of leeway in formulating reasonable rules and regulations. The trick to writing reasonable rules is to be sensible and not arbitrary, capricious, or inflexible to the needs of the students.

Student Handbooks

One of the most successful student defenses when they violate a school rule is that they were unaware of the rule to begin with. In order to combat this argument as well as providing documentation should litigation arise, schools should publish a student handbook. Such a handbook is easy to write, is inexpensive to produce, and can be highly useful in regulating student discipline. It can even be effectively used in elementary schools.

Students should be aware of the rules and regulations designed to govern their conduct while in school. If handbooks are made available to them, then ignorance of the rule can no longer be a legitimate excuse for breaking a rule. Also, if ever taken to court, a written rule can be upheld by a judgment much more easily than an unwritten code of conduct. Written rules are powerful means for controlling student discipline.

Contents of a Handbook

There are various types of things that should be included in the handbook. School schedules, dates of athletic events, and a list of school clubs is information students should have readily available to them. By including these items, the student handbook is not simply a discipline manual.

The section of the handbook listing school rules ought to be labeled "*Reasonable* Rules and Regulations," again creating the concept that the rules are indeed reasonable. In constructing rules, input from students is frequently helpful. Courts will be very reluctant to strike down a rule if it was created by the students, themselves (unless it conflicts with a constitutional right). There should be a general statement indicating that *all* students are expected to abide by the rules and regulations to facilitate the "smooth running of the educational process." Rules can be arranged by category (corporal punishment, suspension and expulsion, etc.) or in some other way, but there should not be pages and pages of rules in the student handbook. A long list of rules leads students and outsiders to view discipline in the school as oppressive and overbearing. The handbook might include rules concerning: 1) corporal punishment, 2) search and seizure, 3) dress codes, 4) students' First Amendment rights, 5) student newspapers, 6) suspensions and expulsions, 7) graduation, diplómas, grades, and student records.

Once the student handbook is put together, it can be mimeographed by the school or printed commercially. Each student should be given a copy of the book. It is wise to set aside an hour or two at the beginning of the school year for the students to read the handbook and ask questions about it. After each student has read the handbook, he

should be required to sign a short form that states something like the following:

I, _____ , have read the student handbook
Student's Name
and understand all that is contained within it.

_____ _____
Student's Signature Date

Such a form can be extremely valuable in a court suit. In elementary schools, teachers can read and explain the rules to students and then record their names and the dates of the reading.

Writing Reasonable Rules and Regulations

As stated earlier, written rules should be clear, concise, easily understandable and not open to more than one interpretation. The rule should *always* contain a justification for making the rule within the rule itself. That way, it cannot be claimed that the rule was created to harrass students.

Penalties for noncompliance with a rule should also be contained within the rule itself. This statement protects educators from the criticism that punishment is not being applied fairly. The following are examples of some well-written rules.

1. Student lockers are for the convenience of the student. This privilege can and will be taken away if the student abuses the privilege by abusing the locker or using it to hide alcohol, drugs, weapons, stolen items, or any other material that does not belong in school. The lockers can and will be inspected by the principal or vice-principal at any time, for any reason, without prior notification to the students.
2. In order to prevent fire, students are prohibited from smoking in the school building. Students found violating this rule will be suspended for a period of two days.
3. Students are expected to demonstrate proper respect for their teachers in order to keep from disrupting the educational process. Any student reported to the principal for verbally abusing

his or her teacher, swearing, or using profane gestures will be suspended for a period of 10 days.

It should be obvious by now that reasonable rules and regulations are not difficult to formulate. Indicate the justification for the rule and the penalty for noncompliance, but be careful not to infringe upon a student's constitutional rights. Educators should not be afraid to create reasonable rules for the smooth operation of the school. On the other hand, they should not go overboard and write either too many rules or rules that are not well thought out.

Conclusion

Controlling student discipline is an integral element of the educational process. The use of disciplinary techniques should be encouraged as a means of helping students gain the most from their educational opportunity. Educators do have broad powers when dealing with student conduct through disciplinary means. As long as there is no blatant violation of the students' constitutional rights, the courts are reluctant to substitute their judgment for those of educators. However, when constitutional rights are involved, the courts take a paternal view and usually hold for the students. As Mr. Justice Fortas said in *Tinker*, "Students in school as well as out of school are 'persons' under our Constitution."

However, educators must be aware of their legal limitations in administering discipline. Oftentimes they believe they are free to dictate certain student behavior when they are not within their legal rights to do so. It is hoped that this fastback has helped to enlighten those concerned with student discipline as to the legal status of various discipline techniques.

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